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MICHIGAN LAW REVIEW

VOL. VI

JANUARY, 1908

No. 3

ROMAN LAW AND MOHAMMEDAN JURISPRUDENCE

II.

THE ROMAN GENS AND THE ARABIAN AKILA

IN examining the early life of the Romans and comparing it with the social condition of the people of the Arabian peninsula in the pre-Islamic times,—who are rightly considered the best type of the race, amongst those who embraced the faith of Mohammed,—we are immediately struck with the great similarity that existed between the Roman *gens*,⁵⁴ or the Greek *γένος* and the Arabian *Akila*, though it cannot thereby be concluded that this likeness necessarily denotes a descent from the same stock. A distinguished French orientalist, in observing this striking similarity, ventured to conjecture that both people, namely, the Romans and the Arabs, have a common origin, tracing respectively their ancestry to the Semitic and Indo-Germanic races, from whom both are supposed to descend.⁵⁵ On the other hand, an eminent English jurist,⁵⁶ pointing out the likeness existing between the Indian village community and the Roman *gens*, does not express the opinion that the latter necessarily derives its origin from India.

Notwithstanding the homogeneity of constitution of the various types of expanded families, be they the Roman *gens*, the Greek *γένος*, the Arabian *Akila*, or the Indian village communities,—which may or may not be entirely accidental,—still it may be said that the grouping of people into families can be ascribed rather to their natural tendency to form bodies politic for a reciprocal protection and defense, than to a common origin or descent from the same race.

⁵⁴ See Fustel de Coulanges. *La cite Antique*, p. 110 et seq.

⁵⁵ See Seignette *Code de Khalil*, p. 38.

⁵⁶ Sir Henry Maine, *Ancient Law*, ed. by Sir Frederick Pollock, p. 256.

The first and essential condition for the constitution of a Roman *gens* was that its members should have had a common male ancestor who had never been under servitude.⁵⁷ In fact, the *ingenui* or gentiles were supposed to trace their origin to pure Patricians, whose blood had never been mixed with that of slaves, nor even with that of those who had been enfranchised. That was, strictly speaking, the meaning of the Roman *gens*.⁵⁸ But we know that besides the *ingenui* or the *gentiles* there were attached to the *gens* some satellites, known by the name of clients, and their descendants; and also the persons who had been enfranchised, and their descendants: all the members of the *gens* being united by the legal tie of *agnatio*,⁵⁹ a fictitious relationship very important in its legal consequences.

If now we examine the Arabian *Akila* we see that it is similar to the Roman *gens* in more than one respect. The *Akila* was composed, first, of people who, both themselves and their ancestry, had never been under servitude, and who all traced their origin to a common male ancestor; second, of persons who had been enfranchised by the *Akila* and their descendants, and, lastly, of persons who, either on account of their weakness or other reasons, placed themselves under the protection of the *Akila*. These latter were called *Moustanas*, namely, clients.⁶⁰ On the other hand, all the members of the *Akila* were agnates with each other, having the same privileges and rights as their Roman brethren.⁶¹

In the early days both of Greece and Rome, relationship was interwoven with the worship of the same domestic deities. Plato tells us⁶² that "relationship is the community of the domestic gods" *συγγένεια ὁμογενῶν θεῶν κοινωνία*. It was the worship of the same divinities, having the same sanctuary, and partaking of the same funeral repast that constituted the relationship.⁶³ Nor was it otherwise in India.⁶⁴ According to a French writer⁶⁵ the Arabian *Akila*

⁵⁷ Quorum majorum nemo servitudinem servivit. Cicero Top., Sec. 6, 29.

⁵⁸ See Ortolan, Explication historique des Instituts, Ed. 1863, Vol. I, pp. 13, 26; Fustel de Coulanges, La cite Antique, p. 115, note; Cuq., Institutions juridiques des Romains, p. 70; Mommsen, Römisches Staatsrecht, Vol. III, Part First, p. 9; Lange, Römische Alterthümer, Vol. I, p. 214.

⁵⁹ Agnatio juris est nomen, Inst. I, 15, 3. See Coulanges, op. cit., p. 58 et seq, also, p. 121, note; Cuq., op. cit., p. 197; Lange, op. cit., p. 275 et seq.

⁶⁰ See Seignette, op. cit., p. 719. The word *Akila* is derived from *Akl*, which in Arabic means link. Ib. Seignette, p. 709.

⁶¹ Seignette, op. cit., p. 714; also, Ibn Khaldoun, Vol. 19, p. 274. The word for agnation used in Arabic is *Assabia*. Compare Hindu Law on Agnation, Sir Henry Maine, op. cit., p. 145.

⁶² Quoted by F. de Coulanges, op. cit., p. 58.

⁶³ Ibid. Coulanges, p. 58.

⁶⁴ Ibid. Coulanges, p. 58. See, also, Sir Henry Maine, op. cit., p. 186.

⁶⁵ Seignette, op. cit., pp. 709, 710.

was, also, closely connected with religion and the very name which was originally given to it, namely, that of *Arsh*, which means "sanctuary," and the locality where it had its residence, "the land of the sanctuary," proves that it did not differ much from the Greek or Roman conception of the *gens*. Both in Greece and Rome it was to the chief of the *gens* that were intrusted the highest sacerdotal duties. The courageous act of Fabius, chief of the *gens*, Fabia, who, during the siege of Rome by the Gauls, came out, at the risk of his life, to make the religious sacrifices in the temple of the *gens* at the Quirinal, is well known in Roman history.⁶⁶ In each family, the *pater familias* performed the religious rites; it was he that initiated his son and successor into the mysteries of religion, in order that the family worship might be perpetuated.⁶⁷ It was he, also, that offered the repast to the dead ancestors.⁶⁸ The worship of the ancestors was common, not only in Greece and Rome but also in India, and the funeral repast was one of the principal rites of the Greco-Roman religion.⁶⁹ On the other hand, it is also probable that the chief of the *Akila* of the pre-Islamic times performed the religious ceremonies of the Arabian *gens*. As a matter of fact, the descendants of the founder of the *Akila* had the exclusive privilege of initiating a stranger into the rites of the worship.⁷⁰ It seems that in Arabia, during the pagan times, some tribes, who believed in the resurrection, being solicitous for the comfort of their departed relatives, used to sacrifice a camel on their tombs in the belief that both the dead and the camel being resuscitated would make the journey to the abode of God and be present at the last judgment.⁷¹ A feature which was common, both to the Roman *gens* (and also to the Greek *γένος*) and the Arabian *Akila*, was the worship of a particular domestic deity. In Rome, as well as in Greece, each *gens* had its *sacra privata*, namely, a special deity of the household, worshipped by all its members. The Greek *ἑστία δαεποινα* and the Roman *Lar*

⁶⁶ Coulanges, *op. cit.*, p. 113.

⁶⁷ *Ibid.* Coulanges, pp. 36, 37.

⁶⁸ *Ibid.* Coulanges, p. 59.

⁶⁹ *Ibid.* Coulanges, p. 32; also, Sir Henry Maine, *op. cit.*, p. 186.

⁷⁰ Seignette, *op. cit.*, p. 711. This distinguished French Orientalist, whom we have quoted so often, tells us that in 1855, whilst he was camping in Algeria with some Mohammedan Arabs, he noticed that they sacrificed a sheep, accompanying the sacrifice with certain pantomimic performances; that, on asking the Arabs the reason of this sacrifice, he was told, that whenever they camped in a country for the first time, it was customary to make the gods of that country propitious. And upon his asking them, who were the gods, the Arabs answered, that it was the dead, who were the guardians of the country, and whose tombs could be seen in that spot. M. Seignette noticed, besides, in Algeria that the noble families of the tribe of Oulad-Sidi Sheih presided at the religious ceremonies performed each year by the various *Akilas*, on the tombs of their ancestors. *Ibid.* Seignette, p. 716.

⁷¹ C. de Perceval, *Histoire des Arabes*, Vol. I, p. 349.

familiae was an indispensable part of every Greek and Roman home. Hence the character of sacredness of the house in which were supposed to reside the domestic gods.

In like manner in the early days of Arabia the *Akila* also was not only a political but also a religious community. Each Arabian *gens* had its own domestic gods, though it was not unusual for two of them to worship the same idols. But as these people were mostly nomadic, they carried with them in their wanderings their movable temples and the idols of their domestic gods. Thus, the Syrian Arabs had movable temples placed on chariots, which were drawn by oxen.⁷² But the majority of these "divinities" were deposited either in a private or public temple.⁷³

It seems that besides these inferior divinities,—which in some way correspond to the domestic gods of the Greeks and Romans,—some of the Arabs of the pre-Islamic times believed in a Supreme Deity, called *Allah Taala*,⁷⁴ who must have been superior to the Greek "Zeus" or the Roman "Jupiter," because he does not seem to have had other companions, the inferior divinities being considered as mere intermediaries between the people and the Supreme God.⁷⁵ It is the opinion of some writers⁷⁶ that in the Roman *gens* there was not any supreme authority to which all the members of the families comprising the *gens* owed obedience, and that the chiefs of the families, namely, the *patres familiae*, were independent of each other, though in a more remote epoch of the Roman history it was otherwise. But if at a later epoch there was no chief of the *gens*, in the military, administrative or judicial sense, it is certain that at all times there existed in every *gens* a person to whom was intrusted some kind of religious and political authority. Each *gens* had a representative in the Senate, who was subsequently chosen by the

⁷² See Seignette, op. cit., 708, 709. Also Caussin de Perceval, *Essai sur l' Histoire des Arabes*, Vol. I, p. 269. After the capture of Mecca by Mohammed, a woman by the name of Hind, and a convert to the new faith, returned to her house and broke the idol of her family, exclaiming: "Feeble creature! How foolish we were to count upon your assistance." C. Perceval, op. cit., Vol. III, p. 241.

⁷³ Thus the *Akila* of Benou-Rabia had its idol in the temple of Rodha; that of the Benou-Thakif in the temple of Lot; in like manner the "Goddess Ozza of the Korayshites was deposited in a private temple. But it was principally in the Caaba, which was a regular Arabian Pantheon, that the majority of the idols of the various *Akilas* were religiously kept. C. Perceval, op. cit., Vol. I, pp. 269, 270. Mohammed subsequently destroyed 360 of these idols in the Caaba. Ib. C. Perceval, Vol. III, p. 231.

⁷⁴ Ibid. C. Perceval, Vol. I, p. 113; also, p. 270.

⁷⁵ Ibid. Perceval, Vol. I, p. 270. Compare the saints of some Christian denominations. It is believed that Jesus Christ was also considered as one of the inferior divinities and worshipped by some of the Arabian tribes. In fact, the figures of Jesus and Mary were carved in one of the columns of the *Caaba* and worshipped by the Arabs before their conversion to the faith of Mohammed. C. Perceval, op. cit., Vol. I, p. 198.

⁷⁶ Cuq., op. cit., p. 72.

King, in consequence of the increase of the number of the *gentes*. Such chief was also the priest, who performed the religious rites for the *gens*.⁷⁷

As to the inner organization of the Arabian *Akila*, we have the authority of Ibn Khaldoun, who, after telling us that the *Akila* was composed of a number of families who had the same male ancestor, gives some details as to the privilege of holding the supreme authority in it, and the right of being included in the nobility. According to this Arabian historian the qualifications necessary for a family to command were, physical and mental superiority over all the other families composing the *Akila*.⁷⁸

We must, therefore, admit that the nobility of the Arabs was of a more democratic character than the *gentilitas* of the Romans. Good qualities did not seem to have had any influence in the elevation to the Roman Patriciate, though in the earliest epoch of Rome, as a Greek writer tells, Romulus appointed as chief of the *gens* the bravest amongst them.⁷⁹ But other Arabian authors, and amongst them Averoes (Aboul-Oulid Ibn Rashid) assert that the acquisition of the title of nobility for an Arabian family depended upon the number of noble ancestors that existed in such family, and upon a residence in a city, because, according to these writers, the title of nobility could be claimed only by those who resided in cities.⁸⁰ A French writer observed that in Algeria a distinctive mark of nobility amongst the Arabs there is the decoration of the tents of the descendants of the original founders of the *Akilas* with a plume of ostrich feathers.⁸¹

It is also possible that the Arabian nobility wore a particular dress, which may have been different, in some way, from that of the common folk; though, judging from the general life of the Arabs, it is not likely that such a distinction was obligatory, as was the case with the Romans. Be that what it may, it is certain that with the advent of the Mohammedan religion, emphasizing the so-called superiority of the "believers" over the "unbelievers," the garment began to play an important part in the social life of the new converts.

In fact, in order to show the superiority of the followers of Mohammed over non-Mohammedan, Omar, one of the early Caliphs,

⁷⁷ See Coulanges, op. cit., p. 115; Ibid. Cuq., p. 72; Mommsen, Staatsrecht, Vol. III, part I, p. 12.

⁷⁸ See Ibn Khaldoun, op. cit., pp. 275, 276.

⁷⁹ ἡγεμόνας τῶν ἀπεδειξετῶν ἀδρεωπᾶτων.

Dionysius of Halicarnassus, Book II, VII, et seq.

⁸⁰ See Ibn Khaldoun, op. cit., p. 283.

⁸¹ See Seignette, op. cit., p. 717.

and a companion of the "Prophet," in assuming the Caliphate ordered the Christians inhabiting in his dominions to wear a special dress, which differed from that worn by Mohammedans;⁸² and although his successors do not appear to have strictly enforced this rule, after nearly two centuries it was again revived when the Christians in Asia were compelled to wear a turban and a belt of a particular color.⁸³ Thus, Haroun Arrashid, the Abasside Caliph of Bagdad in the year 809 A. D., on the pretext that the Greek Emperor Nicephorus, violated a treaty, issued an edict by which the Christians were ordered to wear a particular dress, as a sign of inferiority.⁸⁴

As is well known, both in Rome and in the Greek cities the *gens* or γένος was known by the particular appellation of its original founder. Therefore, a person attached to such *gens* or γένος had more than one appellation. He not only adopted the name of the *gens* (the *nomen*) to which he belonged, but, also, besides his particular name (the *praenomen*) he added that of his family or father (the *cognomen*), and in Rome it was not unusual to have a fourth appellation (the *agnomen*), such as Africanus, Asiaticus. Consequently a complete name of a Roman citizen might have been that of Publicus Cornelius Scipio Africanus.⁸⁵ In like manner the members of the Arabian *Akila* adopted the name of the original common ancestor who founded such *Akila*. Thus the Koreishites, who had always been gentiles, claimed their descent from Koreish.⁸⁶ Therefore, every person attached to the *Akila*, besides the individual name, used that of the *Akila* also, as an appellation.⁸⁷ But, according to Ibn Khaldoun, the *Akila* was designated by the name of the country in which it had its residence or from the locality upon which it was camping.⁸⁸

As both in ancient and modern times the payment of a tribute from one nation to another is considered as a sign of vassalage, so, according to Mohammedan tradition, an *Akila* which pays tribute loses all consideration and respect, such payment being both "dishonorable and distasteful to proud people." Ibn Khaldoun thinks that such a humiliating act leads to the degradation of

⁸² Non-Mohammedans were also prohibited from riding on horses. Weil, *Geschichte der Chalifen*, Vol. II, pp. 161-162.

⁸³ See Laurent, *Histoire du droit des gens*, Vol. V, p. 471.

⁸⁴ See Weil, *op. cit.*, Vol. II, p. 162. After the Turkish conquest the Christians were for centuries prohibited from wearing the same dress as the Mohammedans.

⁸⁵ See Ortolan, *op. cit.*, pp. 275-276, note; Cuq., *op. cit.*, p. 123; Coulanges, *op. cit.*, pp. 122-123; Mommsen, *op. cit.*, p. 11.

⁸⁶ See Seignette, *op. cit.*, p. 708.

⁸⁷ See Ibn Khaldoun, *Prolégomènes*, Vol. 19, p. 273.

⁸⁸ Ibn Khaldoun, *op. cit.*, p. 273.

character and makes such people deceitful. Thus, Mohammed is supposed to have said: "The man who pays a tax or tribute lies; he promises without being able to keep his word." Our Arabian author very justly observes, that the *Akila* which pays a tribute and thereby wears the collar of servitude "on its neck" can never found an Empire.⁸⁹

As in the eyes of the Romans "the tilling of the field" by the Patricians was considered as being incompatible with the dignity of the *gentilitas*, so the Arabs looked upon agriculture as a contemptible occupation and unworthy a noble family. Thus, Mohammed, having once seen a plough share in the house of one of his lieutenants, exclaimed: "These things cannot enter a house without bringing vileness in the hearts of those who reside there."⁹⁰ Independence, according to the same writer, is a natural institution, because it agrees with the nature of human society.⁹¹

THE ROMAN CLIENTS AND THE ARABIAN MOUSTANA

As in Rome each *gens* had its clients, so in the Arabian countries the *Moustana*⁹² were attached to the *Akila*. Leaving aside the much controverted question as to the origin of the institution of clients in Rome,⁹³ and examining their condition as it is described by a classical writer, Dionysius of Halicarnassus, Book II, 11, we see that the position of the client in the *gens* was that of marked inferiority, in contrast with that of his superior, known by the name of patron. Whether the Roman client joined the *gens* simply for protection,⁹⁴ or being a former slave and enfranchised by his master, continued to be attached to the family of his *manumissor*, namely, of his liberator,⁹⁵ he was entitled to certain rights and had also corresponding obligations. Thus it was the duty of the patrons to explain to their clients the laws, to represent them in judicial proceedings, either as plaintiffs or defendants;⁹⁶ further, to look after the interests of the clients, whether they were present or absent, in

⁸⁹ See Ibn Khaldoun, op. cit., Vol. 19, p. 297.

⁹⁰ Ibn Khaldoun, op. cit., p. 297.

⁹¹ Ibid. Ibn Khaldoun, op. cit., p. 298.

⁹² The word *Moustana* means in Arabic a person who receives a benefaction. On the other hand, the patron was known by the name of *Moustani*, namely, the benefactor. Seignette, op. cit., p. 714; also, Ibn Khaldoun, op. cit., Vol. 19, Part First, p. 245.

Another name given to the client was that of *Halif*, namely, a person who took an oath. Ib. Seignette, p. 715.

⁹³ See the various views on the subject in Lange, op. cit., Vol. I, pp. 237 et seq.

⁹⁴ Ortolan, op. cit., Vol. I, p. 22.

⁹⁵ Cuq., op. cit., p. 34; also, F. de Coulanges, p. 128.

⁹⁶ Dion, Book II, X. τοὺς μὲν πατρικίους ἔδει τοῖς ἐαντῶν πελάταις ἐξηγεῖσθαι τὰ δίκαια, * * * * δίκας τε ὑπὲρ τῶν πελατῶν ἀδικουμένων λαγχάνειν, καὶ τοῖς ἐγκαλοῦσιν ὑπέχειν.

regards to money and pecuniary contracts, to act as fathers do for their children; in short, to procure to them, both in private and public affairs, that tranquility which the clients particularly are in need of.⁹⁷ The clients on their side were bound to provide money to their patrons, in case they needed it for the marriage of their daughters; to pay to the enemy the ransom, in case either the patron or his children fell into captivity; to pay to the patrons for any losses they may have sustained in litigations and the fines imposed upon such patrons, and, lastly, to contribute to the necessary expenses incurred by the patron for the office of a magistrate or the performance of any other public duty. A mutual obligation of the patron and client was: not to accuse, or give evidence or vote against each other, such conduct being both impious and illegal.⁹⁸

If now we examine the condition of the Arabian client, we find that the *Moustana* was one who joined the *Akila* for the sake of protection (and sometimes in order to avoid the payment of a fine imposed upon him for an offense which he may have committed), or it might have been a person who, being a slave, was enfranchised; in which case he continued to be attached to the *Akila* as its client.⁹⁹ The *Moustana*, on becoming a member of the *Akila*, took an oath,¹⁰⁰ and from that moment he was entitled to all the privileges of his new situation, and shared all the burdens. Therefore every *Moustana* was entitled to the protection and assistance of his fellow members. If he fell into captivity the *Akila* was bound to pay a ransom for his liberation; if he committed homicide by accident, the *Akila* was under the obligation to pay the necessary compensation.¹⁰¹ A common feature of the Roman client and the Arabian *Moustana* was the adoption of the name of the *gens*¹⁰² by the former and that of the *Akila*¹⁰³ by the latter. As in the Roman law, at least according to the XII Tables, if a client died without any legitimate heirs his inheritance escheated to the members of the *gens* or the gentiles,¹⁰⁴

⁹⁷ Dionysius of Halicarnassus, Book II, 10.

⁹⁸ οὐτε δάσιον οὐτε θέμις. Ibid. Dion, II, X. See, also, Ortolan, op. cit., p. 22, 23; Cuq., op. cit., p. 169; Mommsen, Abriss des Römischen Staatsrechts, p. 19; Fustel de Coulanges, op. cit., p. 128.

⁹⁹ Ibn Khaldoun, op. cit., p. 284. Mohammed said: "The client of an *Akila* is one of its members,—to be an enfranchised client, or one who has been adopted by the *Akila*, or lastly, one who entered the *Akila* by solemn engagement. Ibn. Khaldoun, p. 284.

¹⁰⁰ Ibn Khaldoun, op. cit., p. 274. Also, Seignette, op. cit., p. 715. In the Koran, the word for oath is that of Ahd, which corresponds to the *Ohd*, namely, the oath of fidelity taken by the ancient Germans to their chiefs. Seignette, op. cit., p. 715.

¹⁰¹ Seignette, op. cit., p. 717 et seq.

¹⁰² Ortolan, op. cit., p. 27. Also, Mommsen, Römisches Staatsrecht, Vol. III, Part I, p. 205 et seq.

¹⁰³ Ibn Khaldoun, p. 284.

¹⁰⁴ Si adgnatus nec escit gentiles familiam habento. See Salkowsky, Institutes and History of Roman Private Law, p. 824; Ortolan, op. cit., p. 27; Voigt, Die XII Tafeln, Vol. II; also, Voigt, Römische Rechtsgeschichte, Vol. I, p. 512.

so in the Arabian *Akila*, in a similar case, the members of such *gens* inherited the *Moustana* or client.¹⁰⁵

In Rome, if a member of a *gens* fell into captivity or was reduced to slavery or left the *gens*; i. e., to employ the technical expression of the civil law, if he suffered a *capitis deminutio*, such person having ceased to be attached to the *gens* ceased also to enjoy the rights and privileges accompanying such membership and was released of its burdens and obligations. Consequently the right of mutual inheritance between such a member and the *gens* was extinguished.¹⁰⁶ Nor was it otherwise in the Arabian *Akila*. Thus captivity, apostasy, or the emancipation of any member broke the link that joined such member to the *gens*, consequently the mutual right of inheritance was lost both for such person and the *Akila*.¹⁰⁷ According to Ibn Khaldoun, from the moment a person joined an *Akila* not only any previous blood relationship ceased to have any legal effect,¹⁰⁸ but if he belonged to the nobility he could not retain in the new family his previous position.¹⁰⁹

CITIZENSHIP

The Roman classification of the human race to *cives*, *peregrini*, *hosti*, and *barbari* is too well known to demand any special comment. It is superfluous to say who were the *cives* or citizens. The *peregrini*, according to some civilians, were the foreigners who resided in Rome (or other residents who did not enjoy the right of citizenship), whose country was either under the Roman dominion¹¹⁰ or, not being under the Roman sovereignty, there existed with such nations treaties of amity and friendship.¹¹¹ *Hosti*, on the other hand, were, in the early days of Rome, all aliens, and at a later epoch those who were not yet subjects of Rome; whilst those with whom the Romans were at actual war were known under the name of *perduelli*.¹¹² But it seems that subsequently the word "*hosti*" became synonymous

¹⁰⁵ Seignette, p. 717 et seq.

¹⁰⁶ See Accarias, Précis de Droit Romain, Vol. I, Sec. 181 seq. Also, Cuq., op. cit., p. 202. Mommsen, Römisches Staatsrecht, Vol. III, Part I, p. 8 and note 3; Lange, op. cit., Vol. I, p. 240 et seq.; Vangerow, Lehrbuch der Pandekten, Vol. I, p. 72 seq.

¹⁰⁷ Seignette, op. cit., p. 717.

¹⁰⁸ Seignette, op. cit., p. 719.

¹⁰⁹ Ibn. Khaldoun, op. cit., p. 284. Foreign birth seems to have been, amongst the Arabs, an impediment to nobility. An exception to that rule was, however, made in favor of Djafer the Barmakide, who, though foreign by birth and a client of the Khaliph Haroun El Rashid, attained the highest degree of nobility. Ibid. Ibn. Khaldoun, p. 284.

¹¹⁰ Orlolan, op. cit., Vol. I, pp. 175, 176. Also, Voigt, Römische Rechtsgeschichte, Vol. I, pp. 153, 154, note 3.

¹¹¹ Accarias, op. cit., Vol. I, Sec. 49. Also, Mommsen, Staatsrecht, Vol. III, Part I, p. 598 et seq.

¹¹² Orlolan, op. cit., p. 175.

with *perduelli*.¹¹³ Leaving aside the early epoch of Arabia, during which its people were divided merely into tribes, and examining their condition after their conversion to the faith of Islam, together with that of other Mohammedans, especially after their consolidation into states or empire, we see that the followers of Mohammed divide the human race into that of the "faithful" on one side and that of the "infidels" on the other side. Hence, the division of the world in general into that of the Mussulman country (Dari Islam) on one side, and the enemy country (Dari Harb) on the other side, the latter being inhabited by non-Mohammedans, with whom "the faithful" may be either at peace or war.¹¹⁴ Those may correspond, in some way, the former to the *hosti*, the latter to the *perduelli* of the early days of Rome. The Arabs, however, considering themselves superior to other Muslims, make also a national division, which is that of the Arabs on one side and the foreigners on the other side.¹¹⁵ A third division, which may be called a political one, is that of the Mohammedans; that of the subjects (Zimi) who pay taxes, and that of the foreigners (Mustemin) who reside or travel in the Mussulman dominions, with whose nations there may exist treaties of amity and friendship.¹¹⁶ The latter may be compared, to a certain extent, to that class of *peregrini* residing in Rome with whose countries the city had treaties of *amicitia* and *hospitum*.

Lastly come the enemies (Harbii) of the Mohammedans, or the people with whom the Muslims had no treaties of friendship. (Ibn Khaldoun, op. cit., p. 14.) Those may correspond to the Roman *perduelli* of the early times, or the *hosti* of the later epoch.

SLAVERY

The fundamental distinction between free persons and slaves is not a particular Roman or Mohammedan institution, but that of all mankind. The Romans, however, admitted that slavery was against natural law and that originally all people were born free.¹¹⁷ According to the Institutes of Justinian, slavery is an institution of the *jus gentium*, namely, of that general law applicable in every country, and freedom is the natural right of every person; but slavery is justified by reason of the right of the victor to sell or kill his prisoner of war.¹¹⁸

¹¹³ Accarias, op. cit., Vol. I, Sec. 49. Also, Mommsen, op. cit., p. 598.

¹¹⁴ See D'Ohsson, Tableau Général de l' Empire Ottoman, Vol. I, pp. 12, 13, 14.

¹¹⁵ Ibid. D'Ohsson, p. 14.

¹¹⁶ Ibn Khaldoun, op. cit., Vol. 19, p. 12 et seq.

¹¹⁷ Servitutes * * * sunt iuri naturali contrariae, iure enim naturali ab initio omnes homines liberi nascebantur. (Quoted by Salkowsky, op. cit., p. 161.)

¹¹⁸ Inst. I, 3, 3. See, also, Lange, op. cit., Vol. I, p. 189 seq; Accarias, op. cit., Vol. I, Sec. 36 seq; Maynz, op. cit., Vol. III, p. 105 seq.

The Mohammedans, also, assert that the original condition of mankind is that of freedom,¹¹⁹ but that when a Mussulman sovereign subdues a foreign country by force of arms its inhabitants are by right at the absolute disposal of such sovereign; that consequently he may either put such conquered people to death or reduce them to slavery.¹²⁰ According to the Islamic doctrine, as the "faithful" carry on war in all parts of the world, for the sole object of propagating the Mussulman faith, they believe that it is the duty of all people either to embrace the religion of Mohammed or to submit to the dominion of the Mohammedans, and that until the "infidels" accept either of these alternatives they are to be considered as enemies. If the non-Mohammedans do not become subjects of the sovereign of the "faithful" and pay a tribute they may be sold as common property.¹²¹ A Greek writer tells us that the Romans in their early days treated their slaves well,¹²² but that when Rome began to extend her conquests and many aliens falling into captivity were reduced to slavery, they were not only treated severely but that their lives even were at the entire disposal of their masters.¹²³ According to a Roman historian (Plinius the Ancient, quoted by Accarias, op. cit., Sev. 40), Vedius Pollio, the friend of Augustus, was in the habit of throwing his slaves to the sea lions for food, whenever he fancied that his slaves were at fault. This severity was, however, relaxed subsequently by various imperial "constitutions," i. e., enactments, and during the days of Antonius Pius, if a slave was maltreated by his master such slave could complain to the magistrate; if a master killed his slave without any reason, he was liable to be punished as if he had killed the slave of another; and lastly, any person maltreating his slave could be compelled to sell him.¹²⁴

In the opinion of a distinguished Russian Orientalist¹²⁵ the Mohammedan law is more humane than the Roman in the treatment of slaves. According to this writer, who principally expounds the *Shii* system of jurisprudence, a Muslim is not permitted by law to maltreat his slave, and if a master compels his slave to do anything

¹¹⁹ See Hedaya, translated by Hamilton, Vol. II, p. 823.

¹²⁰ Inaya, quoted by Baillie, Digest of the Mohammedan Law, Part I, p. 346.

¹²¹ Hedaya, quoted by Baillie, op. cit., p. 363. Also, N. Tornau, Das Moslemische Recht, Ed. 1855, p. 177. Also, El Mawerdi Traité de Droit public Mussulman traduit par Le Comte L. Ostrorog., Vol. II, Part I, p. 76.

¹²² See Plat., Life of Coriolanus, quoted by Accarias, op. cit., Vol. I, Sec. 40.

¹²³ Lange, op. cit., Vol. I, p. 190.

¹²⁴ See Accarias, op. cit., Vol. I, Sec. 40. Also, Ch. Maynz, Cours de Droit Romain, Vol. III, p. 105 ff, Ed. 1874.

¹²⁵ N. de Tornau, op. cit., p. 223.

which is beyond the strength of such slave, or if he assaults him, such master is liable to punishment.¹²⁶

In the *Hedaya*, however, which treats of the system of law of the Tunnis, the contrary opinion is expressed.¹²⁷ On the other hand, a contemporary Mohammedan jurist¹²⁸ tells us that the pre-Islamic Arabs either reduced their prisoners of war to slavery or put them to death, but that the Coranic legislation abolished the custom of killing such prisoners and permitted their retention in bondage until they were ransomed; that Mohammed recognized only one kind of slavery, namely, that due to captivity in a *bona fide* lawful war, and he declared that the man who dealt in slaves was the outcast of humanity.¹²⁹ The same author (Seyd Ameer Ali) asserts that slavery by purchase was unknown during the reigns of the first Kaliphs, but that with the accession to the Caliphate of the usurping house of Ommich, a change came over the spirit of Islam. Moewiyah, he adds, was the first Mussulman sovereign who introduced into the Mohammedan world the practice of acquiring slaves by purchase.¹³⁰

Be that what it may, slavery by purchase is a maxim of the Mohammedan law, and up to the present time, notwithstanding the prohibition of the slave traffic by international compact (it is true only in the African continent), it still continues to flourish under the mild expression of "domestic slavery" in the very capital of the Ottoman Empire under the "shadow" of the Kaliph and the very eyes of the representatives of the civilized nations.

As during the Empire a Roman master was prohibited from selling separately the members of a family who were his slaves,¹³¹ so according to the Mohammedan law a master cannot sell separately two brothers, or a father and a son, or a husband and wife, and even other near relatives.¹³² Therefore, if a person acquires a slave who happens to be his relative within the prohibited degree of marriage, such slave becomes, *ipso facto*, free.¹³³

As in Rome the citizens, properly speaking, could not be reduced to slavery by purchase,¹³⁴ so in the Mohammedan countries (at least

¹²⁶ Ibid. Tornau, p. 223.

¹²⁷ See Hedaya, op. cit., Vol. IV, pp. 267 and 282.

¹²⁸ Syed Ameer Ali, The Personal Law of the Mohammedans, pp. 33, 38, 39.

¹²⁹ See, however, contrary opinion in Ostrorog., op. cit., p. 76.

¹³⁰ Ibid. Syed Ameer Ali, pp. 37, 38, 39.

¹³¹ Maynz, op. cit., Vol. III, p. 106.

¹³² Seyd Ameer Ali, op. cit., p. 37 seq.

¹³³ Hedaya, op. cit., Vol. I, p. 421.

¹³⁴ See Accarias, op. cit., Vol. I, Sec. 38. Also, Lange, op. cit., Vol. I, p. 189. Various Imperial constitutions prohibited heretics, Jews and pagans from having Christian slaves; but the Christians, and even the clergy, including the bishops and monks, owned Jewish, pagan and even Christian slaves. Maynz, op. cit., Vol. III, p. 107, note 12.

in theory) a "faithful" cannot lose his freedom by such a proceeding. This, however, seems to be the belief of the "*Sunnīs*," who are in the majority.¹³⁵ The *Shiīs*, on the contrary, hold that it is lawful to purchase a Mohammedan, justifying it by long usage,¹³⁶ an exception being only made to some near relatives, such as the parents of the purchaser, his descendants, his sisters, his uncles from the father's side, his aunts and his nieces, the purchase of these persons being entirely prohibited.¹³⁷

In Rome a slave for centuries was excluded from the *sacra privata*, namely, the worship of the domestic gods of the family of his master, and was more or less deprived of the *sacra publica*; namely, of the worship of the gods of the city,¹³⁸ though in the very early days of Rome it seems to have been otherwise.¹³⁹ But with the advent of Christianity a complete equality of religion between masters and slaves was a matter of course.¹⁴⁰ Whatever might have been the condition of slaves in Arabia in regard to religion before the appearance of Mohammed in that peninsula, it is quite certain that the Koran proclaimed the equality of worship between master and slave.¹⁴¹ Therefore, according to the Mohammedan law, a master has no right to interfere with the religious belief of his slave.¹⁴² In Rome, if a child was conceived *ex justis nuptiis*¹⁴³ it followed the condition of the father, otherwise that of the mother. Again, if it was conceived *ex justis nuptiis*, but was born when the mother was slave, it was still born free. The same rule applied if it was conceived at the time of the slavery of the mother, but was born after such mother obtained her freedom. In short, if the mother happened to be free at any time between the conception and birth of such child, the latter was born free.

¹³⁵ See Hedaya, op. cit., Vol. I, p. 438.

¹³⁶ See Query, Droit Mussulman (Des Shiites), Vol. II, p. 105. See, also, N. de Tornau, Droit Mussulman des Shiites, traduit par Esbach., p. 222.

¹³⁷ Tornau, op. cit., p. 223. In the pre-Islamic times the Arabs, it seems, being passionate gamblers, after losing their fortune used to stake even their liberty in games at hazard. Such was, for instance, the case of a certain El As, who lost his liberty in a game and became the slave of Abou Lahab, an uncle of Mohammed. C. de Perceval, Essai sur l'histoire des Arabes, Vol. I, p. 350 and note.

¹³⁸ Accarias, op. cit., Vol. I, Sec. 39.

¹³⁹ Lange, op. cit., Vol. I.

¹⁴⁰ Ibid. Accarias, Sec. 39.

¹⁴¹ See Seignette, op. cit., Preface XXV.

¹⁴² D'Ohsson, op. cit., p. 190.

¹⁴³ *Iustae nuptiae* may be defined as that particular union of sexes that gave the father *potestas* over the children born to him by his wife. Hunter, op. cit., p. 498. Three conditions are necessary for a marriage called *iustae nuptiae*: (1) puberty, (2) consent of the *pater familias*, (3) *connubium*, namely, the required *status* of citizenship or other condition ordained by law. Accarias, op. cit., Vol. I, Sec. 82. Also, Maynz, op. cit., Vol. III, p. 4.

According to the Mohammedan law, if the father is free his child is born free, independently of the condition of the mother. Again, if the mother gives birth to a child whilst she is free, the child is born free, even if the father was a slave at the time of such birth.¹⁴⁴ The parties may, however, agree, in such a case, that the child shall be slave, and it will consequently be the master's property.¹⁴⁵ Children born from an illegitimate wife are free, if the father is free.¹⁴⁶ The *Shafeites*, namely, the followers of the jurist *Shafei*,¹⁴⁷ hold that children born from a woman under slavery follow the condition of the mother.¹⁴⁸

PECULIUM OF THE SLAVE

The Roman slave was, as we know, allowed to own property, or at least to have some kind of quasi-ownership known by the name of *peculium*, it being acquired, either with the express or the implied consent of his master; in some cases the slave was entrusted only with the administration of property belonging to the master, which was also called *peculium*.¹⁴⁹ But the slave could not, it seems, dispose of the *peculium* without the consent of the master.¹⁵⁰ As the slave was not a person, properly speaking,¹⁵¹ he could neither sue nor be sued,¹⁵² therefore he could not render his master directly liable by his contract,¹⁵³ but he could do so to the extent of the *peculium*. If, however, such master profited by the contract of the slave, he could have been held liable personally and beyond the value of the *peculium*. Again, the master, by returning the profit he made by such contract, could release himself from such personal liability.¹⁵⁴ The Roman slave could carry on trade with the consent of his master, and, as a matter of fact, the Romans, on account of their traditional hatred of commerce, allowed either their slaves or those who had been liberated to carry on commercial or other business for them.¹⁵⁵ If the Roman slave committed an offense or a wrong act without the express command or the knowledge of the master, the latter had the alternative either of paying the necessary compensa-

¹⁴⁴ Accarias, op. cit., Vol. I, Sec. 37. Also, Hunter, op. cit., p. 23.

¹⁴⁵ Tornau, op. cit., p. 204.

¹⁴⁶ D'Ohsson, op. cit., Vol. I, p. 208.

¹⁴⁷ Shafei was the jurist who studied Roman law in the Law School of Syria.

¹⁴⁸ D'Ohsson, op. cit., Vol. I, p. 190.

¹⁴⁹ Accarias, op. cit., Vol. II, Sec. 881.

¹⁵⁰ Accarias, op. cit., Vol. I, Sec. 41; also, Vol. II, Sec. 882.

¹⁵¹ Lange, op. cit., Vol. I, p. 189.

¹⁵² Accarias, op. cit., Vol. I, Sec. 39.

¹⁵³ Maynz, op. cit., Vol. III, p. 110.

¹⁵⁴ Accarias, op. cit., Vol. II, Sec. 881 seq. Also, Maynz, op. cit., Vol. II, pp. 243, 244.

¹⁵⁵ Accarias, op. cit., Vol. II, Sec. 879, 880. Cicero said that the retail trade was a school of falsehood; he was, however, more indulgent to the wholesale trade. (Quoted by Accarias, op. cit., Sec. 879, note 1.)

tion to the aggrieved party or of abandoning such slave to the complainant.¹⁵⁶ The slave could, however, become free by paying the compensation to the sufferer.¹⁵⁷

The Mohammedan slave, also, cannot make a contract nor carry on business without the consent of his master. If the latter gives his consent, he renders himself liable to the party with whom the slave entered into contract.¹⁵⁸ The slave who carries on a trade or business on his own account by the consent of his master is called a *licentiate*.¹⁵⁹ In such a case the slave may be sued, and if he cannot pay his debts the creditors are entitled to sell the slave for the satisfaction of their claims, provided the master of such slave is present in court.¹⁶⁰ If the master wishes to withdraw the license of trade from his slave, he is obliged to do so publicly, namely, in the market place.¹⁶¹ But if he emancipates or sells such a *licentiate* slave he must pay the debts of such slave.¹⁶² In the Mohammedan legislation, also, if a slave causes any damage to any person, the master is liable to such person, and in such a case he has the alternative either of indemnifying the sufferer or losing his slave, who may be sold in order to compensate the aggrieved party.¹⁶³ As the Roman slave who had a *peculium* could own other slaves,¹⁶⁴ so the slave of a Mohammedan could have slaves amongst his property.¹⁶⁵

MANUMISSION OF SLAVES

In Rome the liberation of slaves was the pride of a Patrician, and very often freedom was given to slaves more out of vanity than generosity. In fact, it was not unusual for a Roman citizen to liberate his slaves in order to increase the number of the followers at his funeral with exslaves wearing the garb of liberty.¹⁶⁶ In some cases it was the act of religious necessity, such as the refusal by the heirs of the deceased to accept the inheritance, on account of its incumbrances. As it was then the common belief that the continuation of the *sacra* was absolutely necessary for the repose of the soul of the departed *pater familias*, the slaves were given freedom in

¹⁵⁶ Inst. L. f. IV t. VII, de noxalibus actionibus. Accarias, op. cit., Vol. II, Sec. 884; Hunter, op. cit., p. 21.

¹⁵⁷ Maynz, op. cit., Vol. III, p. 110.

¹⁵⁸ Tornau, Moslemische Recht, p. 104, 178.

¹⁵⁹ Mazoun, Hedaya, op. cit., Vol. III, p. 493. Also, Baillie, op. cit., p. 367.

¹⁶⁰ Baillie, op. cit., p. 367 seq.

¹⁶¹ Hedaya, op. cit., Vol. III, p. 504.

¹⁶² Ibid. Hedaya, p. 504.

¹⁶³ Hedaya, op. cit., Vol. III, p. 502.

¹⁶⁴ Accarias, op. cit., Vol. I, Sec. 41.

¹⁶⁵ Seyd Ameer Ali, op. cit., p. 37 seq.

¹⁶⁶ Ortolan, op. cit., Vol. I, p. 278.

order to perform the religious rites of the family.¹⁶⁷ Therefore an heir, according to the Roman conception, was one who inherits not only the property of the deceased, but also the *sacra*.¹⁶⁸ According to the Mohammedan doctrine, the emancipation of slaves is considered as being a good act. It seems that Mohammed strongly recommended the liberation of slaves who accept the faith of Islam. "Whatever Mussulman," he said, "shall give freedom to a slave (who is a believer), God will for every slave so liberated release a member (of the family) of the emancipator from hell fire."¹⁶⁹ In Rome, by the law of *Aelia Sentia*, a person who was less than twenty years old was, in principle, prohibited from liberating his slaves,¹⁷⁰ and, no doubt, persons of unsound mind could not emancipate their slaves.¹⁷¹ In like manner, according to the Mohammedan law, in order to give freedom to a slave, the master must be of mature age and of sound mind.¹⁷²

By the Roman law, a testator could emancipate the slave of another person. In such a case it was the duty of the heir or legatee to purchase such slave and liberate him.¹⁷³ Mohammed, on the contrary, prohibited such an emancipation. "There is no emancipation," he said, "with respect to a thing (a slave) of which a person is not the owner."¹⁷⁴

We know that at a certain epoch the liberation of slaves required in Rome many formalities, it being done by *vindicta*, namely, by a fictitious suit, *censu*, namely, by the registration of the name of the slave as a citizen, and by testament.¹⁷⁵ But by the law of *Julia Norbana*, in the year 671 A. U. C., the manumission of slaves was simplified to a great extent, and during the time of Justinian the facilities for the liberation of slaves were multiplied.¹⁷⁶ Thus the liberation of slaves was even possible, if made orally before friends, or by letter, or *per mensam*, namely, by sitting at the same table with a slave.¹⁷⁷ By the Mohammedan law, no formalities of any kind are required for the liberation of slaves. If a master says

¹⁶⁷ Accarias, op. cit., Vol. I, Sec. 320.

¹⁶⁸ Accarias, op. cit., Vol. I, Sec. 318.

¹⁶⁹ Hedaya, op. cit., Vol. I, p. 420. Also, Querry, Droit Mussulman (Des Shyites), Vol. II, p. 105.

¹⁷⁰ Lange, op. cit., Vol. I, p. 198. Also, Maynz, op. cit., Vol. III, p. 124; Accarias, op. cit., Vol. I, Sec. 70.

¹⁷¹ Ibid. Accarias, Sec. 70.

¹⁷² Hedaya, op. cit., Vol. I, pp. 420, 421.

¹⁷³ Accarias, op. cit., Vol. I, Sec. 56.

¹⁷⁴ Hedaya, op. cit., Vol. I, p. 421.

¹⁷⁵ Accarias, op. cit., Secs. 53, 54, 55; Maynz, op. cit., Vol. III, p. 119 seq.; Hunter, op. cit., p. 28; Lange, op. cit., Vol. I, pp. 191, 192, 193, 194.

¹⁷⁶ Accarias, Ibid., Secs. 53, 54, 555.

¹⁷⁷ Lange, op. cit., Vol. I, p. 195; Maynz, op. cit., Vol. III, p. 122.

simply to his slave that he is free, or uses any equivalent expression, such slave becomes liberated.¹⁷⁸ In Rome the slave who had a *peculium* could, with the consent of his master, and by his earnings, purchase his freedom.¹⁷⁹

The Mohammedan law seems to be more liberal in this respect. Thus, a slave is there permitted to enter into a written contract with his master, by which the latter may agree that whenever his slave shall pay him the sum of money agreed upon, he shall set him at liberty.¹⁸⁰ As soon as the master enters in such an agreement with his slave, he is not entitled any more to benefit from the labor of such slave, nor can he compel him to work for his (the master's) benefit. Consequently, in such a case, the master cannot dispose of his slave by sale or otherwise, and whenever the slave pays the money agreed upon for his liberty, he becomes free.¹⁸¹ It seems that God (through his "Prophet") favored such an emancipation. "And unto such of your slaves," He said, "as desire a written instrument allowing them to redeem themselves on paying a certain sum, write one, if ye know good in them."¹⁸²

There exists, in the Mussulman law, a provision in respect of slaves of "alien infidels" which has some kind of similarity with the principle admitted in modern civilized nations, that from the moment a slave sets his foot in their territories he becomes *ipso facto* free. In like manner, whenever slaves of "infidel aliens" become Mussulmans and enter the territory of the "faithful" they acquire their freedom, because it is claimed that the servitude of a Mohammedan is not established originally.¹⁸³

In dealing with the slave system of both the Roman and the Mohammedan legislations, we should bear in mind that the slaves in the Islamic countries never played a prominent part, either in social or state affairs, being exclusively used for domestic service.¹⁸⁴ On the contrary, the slaves in Rome—whose numbers far exceeded those of the Mohammedans—were not only servants, but teachers,

¹⁷⁸ Hedaya, op. cit., Vol. I, p. 421. Also, Baillie, op. cit., p. 386.

¹⁷⁹ Accarias, op. cit., Vol. I, p. 100, note 2. Also, Maynz, op. cit., Vol. III, p. 113.

¹⁸⁰ Baillie, op. cit., p. 272.

¹⁸¹ Ibid. Baillie, p. 272.

¹⁸² Sale's Coran, p. 291.

¹⁸³ Hedaya, op. cit., p. 438. See, however, contrary opinion of the *Shi'is*. Query, op. cit., Vol. II, p. 105. Unfortunately, this excellent theory is not put into practice in the Mohammedan countries, which may be proved by the fact that nearly all their slaves profess the Mohammedan faith. The Imperial palaces at Constantinople and the mansions of the high officials of the Sublime Porte are replete with slaves imported mostly from the Russian Caucasus and some parts of Africa. Nor is it otherwise in the palaces of other Mohammedan potentates and in that of their high dignitaries.

¹⁸⁴ Public slaves, namely, those belonging to the State, such as the *servi publici* of Rome, are entirely unknown in the Mohammedan countries.

educators, doctors, and above all, soldiers. They took an active part in all the uprisings of the various factions, trying to help now the one, now the other party, in order to ameliorate their wretched condition. The Mohammedan nations never witnessed such convulsions or slave wars, which, at times, jeopardized the very existence of the Roman Republic. No Mussulman Spartacus has ever disturbed the felicity of the loquacious Arabs, nor the serenity of the indolent Turks.

THEODORE P. ION.

BOSTON UNIVERSITY LAW SCHOOL.

[TO BE CONTINUED.]